

**United States Government  
National Labor Relations Board  
OFFICE OF THE GENERAL COUNSEL**

## Advice Memorandum

DATE: July 23, 2004

TO : Alan B. Reichard, Regional Director  
Region 32

FROM : Barry J. Kearney, Associate General Counsel  
Division of Advice

SUBJECT: Berkeley Bowl  
Cases 32-CA-21172-1, 21251-1

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This case was submitted for advice as to whether the Union waived its right to bargain over unilateral changes by sending the Employer a letter telling it to make every improvement possible, where the Employer's pre-election campaign was marked by serious unlawful conduct, including unilaterally increased changes in benefits, and the Union's letter was in response to an unlawful post-election Employer memo blaming the Union for standing in the way of future improvements.

We conclude that the Union did not waive its bargaining rights by responding to the Employer's memo with a letter urging it to make every improvement possible.

### **FACTS**

The Employer (Berkeley Bowl Produce, Inc.) is an independent full-service supermarket in Berkeley, California, specializing in organic, international and other specialty produce. The bargaining unit consists of approximately 225 eligible voters. The Union (UFCW Local 120) began its organizing drive on May 18, 2003.<sup>1</sup>

Briefly, the Employer responded to the Union's organizing drive by engaging in an unlawful course of conduct including the discharge of two union leaders; warnings, interrogations, threats to close, and surveillance; soliciting employee grievances and promising to remedy them in small and large captive-audience meetings and through written communications to employees; the hiring of a manager to, inter alia, plan and oversee improvements in employees' benefit packages; and significant changes in employees' terms and conditions of employment, including the granting of unprecedented improvements in health benefits, both with respect to the number of employees

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<sup>1</sup> All dates are 2003 unless otherwise indicated.

covered and the nature of the benefits; and the institution of a new professional counseling service called the Employee Assistance Program.<sup>2</sup> Employees' desire for improved health benefits was an important factor in the Union campaign, and was one of employees' main responses to the Employer's solicitation of grievances.<sup>3</sup>

The Union had submitted 152 signed authorization cards with its petition. The election was held on October 30. Out of 213 votes cast, 70 votes were for the Union, 119 votes were against the Union, and there were 24 non-determinative challenges. On November 5, the Union filed objections to the election, including an objection to the substantial unilateral improvements in health insurance.

On November 8, the Employer posted a memo to all employees entitled "Election Vote and Challenges." The memo stated that by filing objections to the election, "[i]t looks like the union does not trust you to think for yourselves in making decisions . . . . One of the union's objections is to the improved health insurance you recently received." The memo continued:

We had hoped to start talking to employees about other positive changes at the store. Unfortunately, the union's objection to the improved health insurance has made us concerned that the union will object to anything else we do to try to make this a better place for you to work. . . .

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<sup>2</sup> Cases 32-CA-20652-1, 20888-1, 209091-1, 21054-1, 21172-1, 21360-1. A hearing on the Consolidated Complaint is scheduled for August 8. Because of the extent and nature of the Employer's unfair labor practices, the complaint also seeks a remedial bargaining order. [FOIA Exemption 5

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<sup>3</sup> [FOIA Exemptions 6 and 7(c)] testified that at least three employees told him that because employees now had health benefits, they did not need to go forward with the Union effort. [FOIA Exemptions 6 and 7(c)] testified that when the Employer offered the employees the great new benefit package, he felt sorry that he had ever signed a Union card.

We do not know how long the union will stand in the way of our moving ahead . . . .<sup>4</sup>

On November 9, four leading employee organizers met with Union attorney David Rosenfeld to discuss the Employer's November 8 memorandum blaming the Union for standing in the way of improvements in employees' terms and conditions of employment. The employees agreed that Rosenfeld should draft a letter permitting the Employer to proceed with its promised improvements. Rosenfeld prepared the following letter:

This letter is written on behalf of UFCW Local 120 and the many employees at Berkeley Bowl. Since the election, Berkeley Bowl managers have told a number of employees that they would like to improve benefits, increase wages and take other action to make Berkeley Bowl a much better place to work at. They have told the workers, however, that because the Union has protested the employer's unlawful conduct, they cannot make any of these improvements.

Local 120 unequivocally waives any objections to any improved benefits, wages or working conditions. The Union asks that Berkeley Bowl make every improvement possible and the Union will not file any objections to challenge in any way any such improvements. Please make any such changes immediately.

On November 10, Rosenfeld sent the letter to the Employer's attorney, and one of the Union supporters distributed it to the employees. A few days later, the Employer removed the November 8 memo and posted a new memo on bulletin boards around the store. The new memo listed four positive changes that the Employer intended to make: revising the employee handbook, reviewing employee wages, instituting an annual holiday party, and having a drawing for 20 free turkeys for employees at Thanksgiving.

In November, the Employer implemented the Thanksgiving turkey give-away. In January 2004, the Employer hosted a holiday party for employees and implemented a new pay scale and pay raises for cashiers, many of whom had been leaders in the Union campaign. Prior to the announcement of the new pay scale, the Employer had no fixed pay scale that established the amount of pay increases based on performance or length of employment, and most cashiers

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<sup>4</sup> The Region is alleging that the November 8 memo violated Section 8(a)(1).

earned between \$11.00 to \$13.50 per hour after one year of employment. When the new pay scale went into effect in January 2004, the current cashiers received pay increases corresponding to the new scale. Cashiers employed for more than one year received raises of about \$5.50 per hour, putting them in the \$18.00 to \$20.00 per hour pay levels. [FOIA Exemptions 6 and 7(c)] testified that the cashiers were the most vocal union supporters, but that after receiving this large raise, they no longer wanted to testify in the case.

Also in January, the two produce department supervisors polled employees regarding whether they would prefer to receive larger raises with cuts in regularly scheduled overtime, or smaller raises with the same amount of overtime. The supervisors told the employees that the Employer was making these changes in order to equalize wages and alleviate employee discontent. After receiving the employees' preferences, produce employees received raises of from \$.50 to \$2.00 per hour, and many had their overtime cut by as much as 10 hours a week. However, produce employees complained that they were actually making less because of the overtime cuts. By letter of February 4, 2004, Union President Hamann wrote the Employer that although it had recently granted overdue raises to cashiers, it had cheated the remainder of the employees by denying them significant raises. The letter also demanded that the Employer give back the overtime hours that employees had previously worked. Hamann never received a response to his letter. Within two months, the Employer reinstated most of the employees' previous overtime. Based on a summary table submitted to the Region by the Employer,<sup>5</sup> produce department employees earned considerably higher earnings in the pay period following the January raises.<sup>6</sup>

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<sup>5</sup> The Employer did not provide the payroll information requested by the Union.

<sup>6</sup> The Region's Amended Consolidated Complaint alleges that the Employer's post-election unilateral implementation of the turkey give-away, a holiday party, and the significant January pay raises for cashiers violated Section 8(a)(1) and (5). If the purported Union "waiver" is invalid, it will retain those allegations, and also issue complaint on a new charge, Case 32-CA-21251, alleging that after the "waiver" letter, the Employer took away overtime and granted wage increases to produce department employees. Also, the Region states that the Employer engaged in direct dealing with produce employees prior to granting the above-mentioned raises and overtime cuts. The direct dealing issue is not submitted for Advice; the Region will make a

**ACTION**

We conclude that the Union did not waive its right to bargain over unilateral changes by sending the Employer a letter urging it to make every improvement possible, in response to an unlawful Employer memo blaming the Union for standing in the way of future improvements by its objection to previous unlawful unilateral changes.

An employer violates Section 8(a)(1) by engaging in tactics designed to undermine employees' confidence in and support for their union and to denigrate its status as collective-bargaining agent.<sup>7</sup> This includes making derogatory misrepresentations about the union, and statements that inaccurately blame the union for the employer's failure to implement positive changes in terms and conditions of employment.<sup>8</sup> Similarly, employer tactics that force the union to either acquiesce to the employer's demands or be inaccurately blamed for the employer's failure to implement positive changes are unlawful. These tactics are coercive because they present the union with a "Hobson's choice" - either accept the offer and, in effect, abdicate its role as employees' bargaining representative, or refuse it and deny to the membership benefits they might otherwise have enjoyed.<sup>9</sup> Because such union acquiescence is made under duress, it does not absolve the employer of its unlawful conduct or result in a waiver of the union's right to object to the unlawful changes.<sup>10</sup>

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determination on that allegation after resolution of the waiver issue.

<sup>7</sup> See Hillhaven Rehabilitation Center, 325 NLRB 202, 204 (1997), enf. den. in part, 178 F.3d 1296 (6<sup>th</sup> Cir. 1999); Miller Waste Mills, Inc., 334 NLRB 466, 467 (2001), enfd. 315 F.3d 951 (8<sup>th</sup> Cir. 2003).

<sup>8</sup> See Hillhaven Rehabilitation Center, 325 NLRB at 204; Miller Waste Mills, 334 NLRB at 467 (it is not surprising that employees would become alienated from the union after employer's letter to employees misrepresented the union's bargaining positions and blamed the union for preventing the employees from receiving their customary annual wage increase).

<sup>9</sup> Rocky Mountain Hospital, 289 NLRB 1347, 1365 (1988); J.P. Stevens & Co., Inc., 239 NLRB 738 (1978), enfd. in rel. part, 623 F.2d 322 (4<sup>th</sup> Cir. 1980).

<sup>10</sup> See J.P. Stevens & Co., 239 NLRB at 738; Rocky Mountain Hospital, 289 NLRB at 1365. The Board has also held in

In J.P. Stevens & Co.,<sup>11</sup> for example, the employer failed to respond to the union's proposals for improving unit employees' benefits, then notified the union about its decision to implement comprehensive improvements in corporate-wide benefit programs at all the nonunion plants. As the ALJ noted, "both sides understood the pressure which the [u]nion felt when offered a benefit being announced at other plants the very same day."<sup>12</sup> Faced with the "Hobson's choice" of agreeing to those identical, unilaterally predetermined benefits or rejecting benefits for the unit employees, the union acquiesced. In finding a violation, the Board described the employer's tactics as "a most effective means of undermining the collective-bargaining process and denigrating the [u]nion's status as collective-bargaining agent."<sup>13</sup>

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other contexts that coerced waivers are invalid. See, e.g., Independent Stave, 287 NLRB 740, 743 (1987) (no effect given to non-Board settlement where there has been fraud, coercion, or duress by any of the parties in reaching the settlement); Clark Distribution Systems, Inc., 336 NLRB 747, 750-751 (2001) (no valid waiver and release of rights to file charges; Board analyzes validity of waiver and release agreements just as private non-Board settlement agreements); Atlantic Marine, Inc., 211 NLRB 230, 232 (1974), enfd. 512 F.2d 1404 (5<sup>th</sup> Cir. 1975) (no valid release signed by two employees under economic duress); Kelly-Springfield, 6 NLRB 325 (1938) (no valid assent to offer of job not substantially equivalent, since under economic duress); Hunt Electronics Co., 146 NLRB 1328, 1332 (1964) (in view of management's coercive campaigning against employees rights, small wonder employees yielded to such pressures and signed revocations of the union prepared by the employer); Peerless Importers, Inc., 294 NLRB 755, 763 (1989), enfd. 907 F.2d 144 (2<sup>nd</sup> Cir. 1990) (even if employee could waive the right to file charges before the Board, the agreement was invalid because of the level of coercion present at the time employee executed it); Admiral Merchants Motor Freight, Inc., 265 NLRB 134, 135 (1982) (employer's suggestion that employees' recall predicated on waiver of existing contract rights had tendency to coerce employees into abandoning their Section 7 right to bargain collectively, and the employees' subsequent accession to the suggestion evidences as much).

<sup>11</sup> 239 NLRB 738.

<sup>12</sup> *Id.* at 751.

<sup>13</sup> *Id.* at 738.

In Rocky Mountain Hospital,<sup>14</sup> the employer responded to the union's 14.5 percent wage increase proposal with a 3.5 percent increase, and then announced an 8.5 percent wage increase for all employees excluding those in the bargaining unit. After stating that unit employees were excluded because their changes were subject to negotiations with the union, the employer then offered the union the same 8.5 percent raise. The union accepted the offer. As the Board concluded, the offer presented the union with a "Hobson's choice - either accept the offer and, in effect, abdicate its role as employees' bargaining representative or refuse it and, thereby, deny to the membership benefits enjoyed by all other employees."<sup>15</sup>

By contrast, in Queen of the Valley Hospital,<sup>16</sup> a union validly waived its right to bargain over employee benefits where the waiver was not obtained under duress, and where lawful factors accounted for the employer's decision to grant the benefits. In that case, it was the employer who was caught "between a rock and a hard place," since the employer had already determined to grant a wage increase, but was told by his attorney that it did so at the risk of an unfair labor practice.<sup>17</sup> Thus, the Employer in good faith obtained assurances from the union that if it implemented an increase, the union would not file a ULP charge.

Based on the above principles, we agree with the Region that the Union's letter "waiv[ing] its objection to improved" changes, and asking the Employer to "make every improvement possible," was not a valid waiver of the Union's right to bargain over and challenge those changes. Although the Employer was not recognizing the Union as representative of the employees, it nevertheless blamed the Union for standing in the way of improved terms and conditions of employment by alleging that the Employer had acted improperly by, among other things, implementing a large benefit in health insurance. We are aware that none of the above cases specifically addresses the situation here, in which the nonrecognized Union explicitly waived its right to object to *any future* changes. However, as in those cases, the Union's waiver was the direct product of

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<sup>14</sup> 289 NLRB at 1363.

<sup>15</sup> Id. at 1365.

<sup>16</sup> 316 NLRB 721 (1995).

<sup>17</sup> Id. at 735.

the Employer's coercive conduct, which left the Union no feasible alternative. As the Region has already found, the Employer's memo blaming its failure to make additional improvements on the Union's decision to file election objections violated Section 8(a)(1) and was a continuation of the Employer's unlawful pre-election campaign strategy to undermine Union support.<sup>18</sup> Thus, the memo heightened expectations, unlawfully created by the Employer during the campaign, of additional improvements, and then blamed the Union for preventing those improvements. In effect, the thrust of the memo was that the Employer wanted to implement more unlawful unilateral changes, and the Union would not let it do so.

In this context, the foreseeable and clearly intended effect of the November 8 memo was to confront the Union with a "Hobson's choice": either waive its right to object to any future improvements in employee working conditions, and thereby abdicate in large measure its statutory role as an employee representative, or do nothing, and be held accountable by the employees when the Employer refused to make improvements which, according to the Employer's memo to the employees, would have been theirs had the Union not previously filed objections to the election. Whichever path the Union chose, it could only lead to undermining its effectiveness in the eyes of employees. Under these circumstances, the Union made its so-called waiver of objections to any improved benefits, wages or working conditions under duress, and therefore was invalid.

We reject the Employer argument that the Union freely waived its right to bargain over all future improvements, or else it would have availed itself of one of "many" other more limited alternative responses to the Employer's November 8 memo. None of these purported "alternatives" mentioned by the Employer would have succeeded in mitigating the serious damage to Union support caused by the Employer's unlawful course of conduct. For example, Union protestations that the memo was inaccurate or that employees could obtain better benefits through collective bargaining would have seemed hypothetical at best - and small comfort - in response to the promise of improvements in the Employer's November 8 memo when the Employer had already unilaterally implemented a large health benefit. Further, the Employer's suggestion, after the fact, that the Employer might have agreed to give the Union credit for certain improvements if the Union offered to waive its right to bargain certain issues is implausible in view of

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<sup>18</sup> Although not currently included in the Complaint, the Region may also wish to allege the November 8 memo as unlawful direct dealing.

the Employer's course of conduct throughout the campaign, including unlawful promises, unilateral changes, and direct dealing, designed to disparage the Union as an ineffective employee representative. Finally, contrary to the Employer's suggestion, Union attempts to limit its waiver to specific issues might easily have backfired if the Employer decided to blame the Union, as it was wont to do especially before the election, for any Employer decision not to add additional benefits.

Accordingly, we conclude that the Union's November 9 letter was not a waiver of its right to bargain about improvements in employees' terms and conditions of employment, and, therefore, the Employer's unilateral changes after that date also violated Section 8(a)(5).

B.J.K.